Supreme Court, U.S.
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No. 98-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Seacoast Motors of Salisbury, Inc.,

Petitioner,

v.

Chrysler Corporation,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this case is the most appropriate vehicle to resolve the five-to-three split in the circuits over whether, under 28 USC 1291 or 9 USC 16, a district court's dismissal of a plaintiff's complaint pending arbitration is "final" and immediately appealable?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are listed in the caption. Petitioner Seacoast Motors of Salisbury, Inc. has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 4

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED ON THIS FREQUENTLY RECURRING QUESTION OF FEDERAL LAW 4

II. THE DECISION BELOW IS ERRONEOUS 5

III. THIS CASE IS THE APPROPRIATE VEHICLE TO RESOLVE THE CONFLICT IN THE CIRCUITS 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Pages**

Altman Nursing v. Clay Capital Corp., 84 F.3d 769 (5th Cir. 1996) 3, 5

Armijo v. Prudential Ins. Co., 72 F.3d 793 (10th Cir. 1995) 3, 5

Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990) 3, 5

Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Central Ltd., No. 97-3484, 1998 U.S. App. LEXIS 20778 (7th Cir. Aug. 25, 1998) 6

Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93 (8th Cir.1994) 3, 5

McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997), *pet. for cert. pending*, No. 97-1895 ..... 3, 5

Muscarello v. United States and Cleveland v. United States, Nos. 96-1654 and 96-8837, 66 USLW 4459 (1998) 6

Napleton v. General Motors Corp., 138 F.3d 1209 (1998), *pet. for cert. pending*, No. 98-297 3-5

Nationwide Ins. Co. v. Patterson, 953 F.2d 44 (3rd Cir. 1991) 3, 5

Statutes, Regulations, and Rules

9 USC 16 ..... *passim*

28 USC 1291 ..... *passim*

Miscellaneous Authorities

McCarthy v. Providential Corp., Pet. for Cert., No. 97-1895 7-8

Napleton v. General Motors Corp., Pet. for Cert., No. 98-279 ..... 6, 9

No. 98-___

IN THE

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OCTOBER TERM, 1998

Seacoast Motors of Salisbury, Inc.,

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v.

Chrysler Corporation,

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Petition for a Writ of Certiorari
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for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Seacoast Motors of Salisbury, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The district court's opinion dismissing Petitioner's complaint (Pet. App. 7a-15a (per Collings, Magistrate Judge)) is published at 959 F. Supp. 52. The district court's separate entry of judgment (Pet. App. 16a) is unpublished. The First Circuit's opinion dismissing Petitioner's appeal for lack of appellate jurisdiction (Pet. App. 1a-5a (per Stahl, J., joined by Senior Judge Cyr and District Judge Shadur)) is published at 143 F.3d 626. The First Circuit's order denying rehearing and rehearing *en banc* (Pet. App. 6a) is not published.

JURISDICTION

The district court entered its judgment on April 22, 1997. The First Circuit entered its judgment on May 13, 1998. The First Circuit denied Petitioner's timely petition for rehearing and rehearing *en banc* on June 10, 1998. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

STATUTES INVOLVED

The statutes relevant to this Petition – 28 USC 1291 and 9 USC 16 – are reprinted in the appendix (Pet. App. 17a-18a).

STATEMENT

This Petition is filed in anticipation that the Court will consider it together with three other Petitions presenting closely related questions. No. 97-1895, *McCarthy v. Providential Corp.*; No. 98-189, *De Carbon v. GMC*; and No. 98-297, *Napleton v. GMC*. Some familiarity with the issues raised by those Petitions therefore is assumed here. Moreover, counsel of record in this case recently have been retained to represent the petitioners as co-counsel in *De Carbon*. Contemporaneous with filing this Petition, we are preparing the Reply Brief in *De Carbon*, which will address the conflict in the circuits and the merits of the question presented, and which will circulate to the Court before this Petition. Accordingly, here we address those issues relatively briefly, cross-referencing the *De Carbon* Reply where appropriate.

1. In the nomenclature of federal arbitration law, this lawsuit is an "embedded" action. In "independent" actions, the only question before the district court is whether arbitration is required. For example, a party may sue for a declaration that the dispute either is or is not arbitrable, for an order enjoining the arbitral proceedings, or for an order under § 4 of the Federal Arbitration Act compelling arbitration. An "embedded" action is exactly the same as an "independent" action except that the court is also asked to address the merits of the parties' dispute. In this case, for example, Petitioner sued for a judgment on the merits and Respondent moved to

stay or to dismiss the case pending arbitration. A suit also is "embedded" if the plaintiff requests *both* a declaration that arbitration is not required and a judgment on the merits.

2. Petitioner is an automobile dealership that sells Chrysler vehicles in Salisbury, Massachusetts. Petitioner sued Respondent Chrysler Corporation in Massachusetts state court alleging that Respondent's plan to authorize a new Chrysler dealership in nearby Haverhill, Massachusetts constituted unfair competition and an unfair or deceptive trade practice in violation of state law. Respondent removed the case to federal district court and, invoking an arbitration provision in the parties' contract, moved for "an order dismissing or, alternatively, staying the action and compelling the plaintiff . . . to proceed with arbitration." Pet. App. 7a. Petitioner opposed the motion on the ground that arbitration would violate public policy. The district court disagreed, granted Respondents' motion, and dismissed the complaint. *Id.* 15a, 16a.

3. The First Circuit dismissed Petitioner's appeal for lack of appellate jurisdiction. Pet. App. 5a. The court recognized that the Third, Sixth, and Tenth Circuits "have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded." Pet. App. 4a-5a (citing *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44 (3rd Cir. 1991); *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)). The First Circuit contrasted that holding, however, with the view of "other circuits[, which] have focused on the distinction between embedded and independent proceedings to determine whether jurisdiction exists over an appeal from a dismissal of an order favoring arbitration." Pet. App. 5a (citing *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); *In re Pisgah Contractors*, 117 F.3d 133 (4th Cir. 1997); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994)).

In particular, the First Circuit relied extensively on the Seventh Circuit's opinion in *Napleton v. General Motors Corp.*, 138 F.3d 1209 (1998), *pet. for cert. pending*, No. 98-297. Pet. App. 4a. In *Napleton*, a divided panel held that it lacked appeliate jurisdiction over the dismissal of an embedded action in favor of arbitration. The panel majority reached this conclusion based on earlier circuit precedent that "focused, almost myopically, on whether a proceeding is independent or embedded." 138 F.3d at 1213. In this case, the First Circuit expressly adopted the Seventh Circuit's view that pro-arbitration orders are never appealable in embedded actions, even if the district court does not stay the case but instead dismisses the complaint outright:

> The *Napleton* panel followed the latter approach, concluding that "it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration." [138] F.3d at [1212]. We do likewise and hold that we lack jurisdiction under the FAA to review whether the court's order compelling arbitration was proper.

Pet. App. 5a. The First Circuit therefore dismissed Petitioner's appeal for lack of jurisdiction and refused to reach the merits of Petitioner's argument that its claims against Respondent are not subject to arbitration. *Id.* at 5a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED ON THIS FREQUENTLY RECURRING QUESTION OF FEDERAL LAW.

1. In the *De Carbon* Reply Brief, we discuss at length the conflict in the circuits over whether a district court's dismissal of a plaintiff's complaint in favor of arbitration is immediately appealable under 28 USC 1291 or 9 USC 16(a)(3). Five circuits, including the First Circuit in this case and the Ninth

Circuit in *De Carbon*, hold such an order nonappealable. Pet. App. 5a (1st Cir.); *Napleton*, 138 F.3d 1209 (7th Cir.); *McCarthy*, 122 F.3d 1242 (9th Cir.); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994). Three circuits squarely disagree. *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44 (2d Cir. 1991); *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990).

2. The recurring nature of the issue is also plain from the large number of recent district court decisions that have dismissed cases pending arbitration, thereby directly implicating the conflict in the circuits. We collect those decisions in the *De Carbon* Reply. The fact that four Petitions contemporaneously are before the Court similarly demonstrates that the question presented arises frequently. The Court also is unlikely later to have such a unique opportunity to select an appropriate vehicle to resolve the conflict.

II. THE DECISION BELOW IS ERRONEOUS.

As we discuss at length in the *De Carbon* Reply, certiorari also is warranted because the decision below conflicts with the plain meaning of both 28 USC 1291 and 9 USC 16(a)(3). Those statutes provide an express right to appeal from "all final decisions of the district courts" as well as any "final decision with respect to an arbitration." The Federal Arbitration Act is absolutely clear: "interlocutory" "stays" are not appealable (9 USC 16(b)(1)); "final decisions" are appealable (*id.* § 16(a)(3)). No order is more final than an order of dismissal.

III. THIS CASE IS THE APPROPRIATE VEHICLE TO RESOLVE THE CONFLICT IN THE CIRCUITS.

With four related Petitions for Certiorari now pending, the Court should grant certiorari in whichever case presents the

clearest vehicle for resolving the conflict in the circuits.[1] The conflict in the circuits has three elements: when a district court (i) finally disposes of a case (ii) by dismissing the case pending arbitration, (iii) is the order of dismissal appealable under either 28 USC 1291 or 9 USC 16(a)(3)? This case directly implicates the conflict in the circuits.[2]

1. The district court in this case dismissed Petitioner's complaint and entered a judgment set forth on a separate document. Pet. App. 15a, 16a; FRCP 58. The district court therefore indisputably believed that the matter was resolved and would be removed from its docket. By contrast, in No. 98-297, *Napleton v. GMC*, it is not clear what effect the district court's order has. In *Napleton*, the district court entered an "order," *not* a judgment, which "grant[ed] the motion to dismiss *without prejudice* to allow for arbitration." Pet. for Cert., No. 98-297, at 31a (emphasis added). The Seventh Circuit, which decided *Napleton*, recently has adopted a unique rule construing that type of order substantively as a *non*-final stay, such that the matter remains on the district court's docket. *Baltimore & Ohio Chicago Terminal R.R. Co. v. Wisconsin Central Ltd.*, No. 97-3484, 1998 U.S. App. LEXIS 20778 (7th Cir. Aug. 25, 1998) (per Posner, J.) ("A dismissal [pending arbitration] with leave to reinstate is not appealable as a final order, as an ordinary dismissal would be and most stays would not be. In other words, we treat a dismissal with leave to reinstate as if it were a stay. And so in this case, too, we shall look behind labels, construe 'reinstate' to mean 'reactivate,' *and so interpret the district court's order as a stay rather than a dismissal*." (citations omitted; emphasis added)).

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[1] If there is any question regarding which vehicle is appropriate, we suggest that the Court grant certiorari in *both* this case and *De Carbon* and consolidate the two cases for argument. *Cf. Muscarello v. United States and Cleveland v. United States*, Nos. 96-1654 and 96-8837, 66 USLW 4459 (1998)

[2] In addition, pending disposition of this Petition, no arbitration has been commenced in this case, ensuring that it will not become moot in the interim.

2. The second element of the conflict in the circuits is that the dismissal was for the sole purpose of allowing arbitration to proceed. That unquestionably is true in this case. Pet. App. 15a. By contrast, in No. 97-1895, *McCarthy v. Providential Corp.*, the district court apparently did *not* dismiss the petitioners' complaints based on the fact that the petitioners' claims were subject to arbitration. The *McCarthy* petitioners filed a class action complaint. In response to the respondents' motion to compel arbitration, the petitioners argued (i) that their claims were not subject to arbitration, and alternatively (ii) that, if arbitration were required, then "class treatment is appropriate and that the [District] Court [was] authorized *to compel class arbitration*." Pet. for Cert., No. 97-1895, at 36a (emphasis added). The district court concluded both that arbitration was required and that it could not "compel arbitration on a class basis where the agreement did not specifically provide for it." *Id.* at 37a.

The district court in *McCarthy* apparently dismissed the complaint based on the *latter* "class action" holding, not the former holding regarding arbitrability. The district court acknowledged that "[n]ormally, under 9 U.S.C. § 3, a court would stay proceedings pending the conclusion of the arbitration." Pet. for Cert., No. 97-1895, at 39a. But because the arbitration would proceed on a different basis than the complaint – *i.e.*, individually rather than as a class action – the district court concluded that "in the present case, none of plaintiff's claims remain to be resolved by this court, and therefore there is no reason to stay these proceedings pending the arbitrator's decision." *Id.*

Moreover, if certiorari were granted in *McCarthy*, this Court likely would conclude that jurisdiction existed in the court of appeals for reasons unrelated to arbitration, and therefore would not reach the question presented. The *McCarthy* petitioners argued on appeal not only that their complaint should not have been dismissed, but also that "the district court does have the power to order arbitration to proceed on a consolidated or class-wide basis." Pet. for Cert., No. 97-1895, at 3a. It therefore appears that the court of

appeals should have asserted jurisdiction over at least this claim under 9 USC 16(a)(1)(B) because the district court effectively "den[ied] a petition under section 4 of this title to order arbitration to proceed." If the court of appeals were to assert jurisdiction under 9 USC 16(a)(1)(B) and conclude that class action arbitration was appropriate, the district court would on remand likely vacate its order of dismissal. *See supra.*

3. The instant case also is a superior vehicle to resolve the conflict in the circuits because it would present the Court with the opportunity to address the conflict in the circuits over the courts of appeals' jurisdiction under *both* 28 USC 1291 and 9 USC 16(a)(3). *E.g.*, *Armijo*, 72 F.3d at 797 (10th Cir.) ("[H]ere we have a final order compelling arbitration. 9 U.S.C. 16(a)(3) expressly provides for the appealability of a final order with respect to arbitration."); *Arnold*, 920 F.2d at 1276 (6th Cir.) ("Because there is nothing left for the district court to do but execute the judgment, the district court's order is final and appealable under 28 U.S.C. § 1291 *and under 9 U.S.C. [16](a)(3).*" (emphasis added)). In *McCarthy*, by contrast, the petitioners ask the Court to consider whether jurisdiction exists *only* under 28 USC 1291. *See* Pet. for Cert., No. 97-1895, at i.[3] As a result, if the Court were to grant certiorari in *McCarthy* and conclude that jurisdiction does not exist under 28 USC 1291 (*i.e.*, if the *McCarthy* petitioners were to lose on the merits), the Court likely would be required to grant certiorari in another case to determine whether jurisdiction nonetheless exists under 9 USC 16(a)(3).

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[3] The Court cannot address 9 USC 16(a)(3) by construing the second question in *McCarthy* – "Whether the Federal Arbitration Act effects a partial repeal of 28 USC §1291 by prohibiting appeal of certain final judgments of district courts when they are based upon the holding that the plaintiffs' claims must be arbitrated?" This question's reference to the "Federal Arbitration Act . . . prohibiting appeal of certain final judgments" is a reference to 9 USC 16(b), not 9 USC 16(a)(3), and raises the *McCarthy* petitioners' assertion that "the two federal statutes [the FAA and § 1291] are not necessarily incompatible with each other, although the Fifth, Eighth, and Ninth Circuits apparently believe that Section 16(b)(2) of the FAA partially overrides Section 1291." Pet. for Cert., No. 97-1895, at 12.

4. Finally, there is some uncertainty regarding whether the petitioner in *Napleton* has standing. The substantive issue in *Napleton* is the Respondent's right to lease certain property from Katherine Napleton. According to the Seventh Circuit's opinion, "The day after [Mr. Napleton] received the property, he conveyed it to his wife, Katherine Napleton," Pet. for Cert., No. 97-297, at 2a; subsequently, the Respondent made payments on the property "with a single check made payable to Katherine," *id.* at 3a. *See also id.* at 15a (Wood, J., dissenting) ("As the majority recounts, this action began as a claim for declaratory and injunctive relief in the Circuit Court of Cook County, brought by Katherine Napleton to determine whether the lease of her property to General Motors had properly been renewed for the term beginning January 1, 1996."). Ms. Napleton is the captioned plaintiff in the district court's order. *Id.* at 29a. The party on appeal in the Seventh Circuit and the petitioner before this Court, however, is not Ms. Napleton, but instead "Katherine R. Napleton, *not individually*, but as Trustee under the Katherine R. Napleton Revocable Self-Declaration of Trust Dated October 1, 1992." In a footnote, the Seventh Circuit raised but did not resolve whether the Trustee was in fact a proper party. Pet. for Cert., No. 98-297, at 2a n.2. The Petition in *Napleton* does not address the issue, which therefore is difficult to resolve without reviewing the record below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 8, 1998

SEACOAST MOTORS OF SALISBURY, INC.,
Plaintiff, Appellant, v.
CHRYSLER CORPORATION, Defendant, Appellee.

No. 97-1694

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

May 13, 1998, Decided

COUNSEL: Nicholas J. Decoulos, with whom Decoulos & Decoulos was on brief, for appellant.

George W. Mykulak, with whom Robert D. Cultice, Louis J. Scerra, Jr., and Goldstein & Manello, P.C. were on brief, for appellee.

Before Stahl, Circuit Judge, Cyr, Senior Circuit Judge, and Shadur,* District Judge.

STAHL, Circuit Judge.

Plaintiff-appellant Seacoast Motors of Salisbury, Inc. ("Seacoast") appeals from a district court order dismissing its complaint and compelling arbitration. We hold that we lack jurisdiction to review the propriety of the district court's non-final, "embedded" order compelling arbitration.

I. FACTS AND PRIOR PROCEEDINGS

On October 21, 1991, Seacoast, an automobile dealership, and Chrysler Corporation ("Chrysler") entered into five agreements authorizing Seacoast to sell and service new

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* Of the Northern District of Illinois, sitting by designation.

Chrysler motor vehicles in Salisbury, Massachusetts. By the terms of the agreements, all disputes had to be submitted to arbitration.[1] On February 6, 1996, Chrysler notified Seacoast that it intended to establish a new Chrysler dealership in nearby Haverhill, Massachusetts. In response, on August 9, 1996, Seacoast filed a complaint in the Essex County Superior Court alleging that, by seeking to establish a dealership in Seacoast's market area, Chrysler had engaged in unfair or deceptive acts or practices in violation of Mass. Gen. Laws ch. 93B. Seacoast sought to enjoin establishment of the new franchise and to recover damages, fees, and costs.

On August 22, 1996, Chrysler removed the case to federal court based on diversity jurisdiction. Shortly thereafter, relying on sections 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, Chrysler moved for "an order dismissing or, alternatively, staying the action and compelling the plaintiff . . . to proceed with arbitration." Seacoast opposed the motion on the ground that arbitration in this case would contravene public policy. Pursuant to an agreement between the parties, the case was transferred to a magistrate judge, who, on April 22, 1997, dismissed the case with costs and compelled arbitration. Seacoast now appeals the dismissal.

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[1] The arbitration clause in each of the agreements reads as follows:

> Any and all disputes arising out of or in connection with the interpretation, performance or non-performance of this Agreement or any and all disputes arising out of or in connection with transactions in any way related to this Agreement (including, but not limited to, the validity, scope and enforceability of this arbitration provision, or disputes under rights granted pursuant to the statutes of the state in which DEALER is licensed) shall be finally and completely resolved by arbitration pursuant to the arbitration laws of the United States of America as codified in Title 9 of the United States Code, §§ 1-14, under the Rules of Commercial Arbitration of the American Arbitration Association.

II. DISCUSSION

Seacoast urges us to review the propriety of the lower court's order, which both dismissed the action and compelled arbitration. The question that we must address initially is whether appellate jurisdiction attaches to the court's order compelling arbitration. We conclude that the order was interlocutory, and that we therefore lack jurisdiction to review it.

Section 3 of the FAA provides that, when an action implicates an issue covered by an arbitration agreement between the parties, the district court, at the request of any party, "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Section 4 provides that any party to an arbitration agreement may petition the district court for an order compelling arbitration, irrespective of any ongoing proceeding. *See id.* § 4. Appellate review of orders that favor arbitration -- that is, orders that stay an action pending arbitration pursuant to section 3 or compel arbitration under section 4 -- is proscribed, if those orders are "interlocutory." *See id.* § 16(b)(1) & (2). Under section 16(a)(3), however, an appellate court may review the merits of orders that favor arbitration, if those orders are "final decisions." *Id.* § 16(a)(3). Thus, whether a particular order favoring arbitration is appealable depends on whether it is final or interlocutory.

The general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefore not immediately reviewable, if the arbitrability issue is "embedded" -- that is, "if issues other than the propriety of arbitration are raised or relief other than a determination as to the arbitrability of the dispute is sought." *Adair[Bus Sales v. Blue Bird Corp.,* 25 F.3d 953[,] 955[(10th Cir. 1994)]. By contrast, an order qualifies as a final order within the meaning of section 16 if the action is "independent," or brought solely for the purpose of obtaining such an order. *See Prudential Ins. Co. of America v. Lai,* 42 F.3d 1299, 1302 (9th Cir. 1994); *Humphrey v. Prudential*

Secs., Inc., 4 F.3d 313, 317 (4th Cir. 1993); *S+L+H S.p.A.* v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1522 (7th Cir. 1993); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). We follow this rule of appealability, which is based on finality principles that were firmly established at the time of section 16's enactment in 1988. *See Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 729-32 (4th Cir. 1991).

Chrysler's request for arbitration is embedded because the issue of arbitrability arises here in the context of a claim for relief (brought by Seacoast) that goes beyond a determination of the arbitrability of the dispute. It does not matter that all of the substantive claims in the suit -- the "other relief sought" -- are would-be subjects of the arbitration. *See Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (holding that, even when the pending suit is limited to arbitrable claims, the order compelling arbitration is embedded); *Humphrey*, 4 F.3d at 318 (same).

However, that arbitrability was an embedded issue does not by itself answer the jurisdictional question. In most embedded proceedings in which the district court's decision favors arbitration, the district court, pursuant to section 3, stays the action pending arbitration. Here, by contrast, although the district court granted Chrysler's motion to compel arbitration, it entered an order dismissing, rather than staying, the proceedings. We must address, then, whether a dismissal without prejudice in deference to arbitration in the context of an embedded proceeding is an appealable (that is, final) decision.

This circuit has not addressed this question before, and other circuits have been divided on the issue. As the Seventh Circuit outlined recently in *Napleton v. General Motors Corp.*, 138 F.3d 1209, (7th Cir. 1998), some circuits have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded, *see Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995) (finding jurisdiction when, in an embedded proceeding, the district court had

ordered arbitration and dismissed action, on the basis that the moving party had requested that the action be dismissed, not stayed, pending arbitration); *Nationwide Ins. Co. of Columbus, Ohio v. Patterson,* 953 F.2d 44, 46 (3d Cir. 1991) (finding jurisdiction to review an arbitration order on the basis that "the district court's dismissal of [the] action plainly signifies that the arbitration is not a part of any ongoing proceeding"); *see also Arnold v. Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990) (discerning in the FAA's legislative history an intention to abrogate the distinction between embedded and independent proceedings and to "allow appeals from final decisions affecting arbitration whether or not they direct or refuse to direct arbitration," and, correspondingly, finding jurisdiction to review an arbitration order in which the proceedings had been dismissed), while other circuits have focused on the distinction between embedded and independent proceedings to determine whether jurisdiction exists over an appeal from a dismissal of an order favoring arbitration, *see McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro,* 15 F.3d at 96.

The *Napleton* panel followed the latter approach, concluding that "it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration." 138 F.3d at 1212. We do likewise and hold that we lack jurisdiction under the FAA to review whether the court's order compelling arbitration was proper. Such a result avoids elevating form over substance and promotes both the pro-arbitration purposes of the FAA and the institutional goal of avoiding piecemeal appeals and systemic delays. *See id.* at __ .

Accordingly, Seacoast's appeal is dismissed for want of appellate jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1694

SEACOAST MOTORS OF SALISBURY, INC.,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,
Defendant-Appellee

BEFORE
TORTUELLA, Chief Judge,
SYR, Senior Circuit Judge,
SELYA, BOUDIN, STAHL AND LYNCH, Circuit Judges.
SHADUR,* District Judge

ORDER OF COURT
Entered: June 10, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion of rehearing en banc be denied.

By the Court:
Phoebe D. Morse, Clerk
By: /s/
Chief Deputy Clerk

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* Of the Northern District of Illinois, sitting by designation.

SEACOAST MOTORS OF SALISBURY, INC., Plaintiff, v. CHRYSLER CORPORATION, Defendant.

CIVIL ACTION NO. 96-11695-RCL

(COLLINGS, U.S.M.J.)[1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

April 22, 1997, Decided

COUNSEL: For SEACOAST MOTORS OF SALISBURY, INC., Plaintiff: Nicholas J. DeCoulos, DeCoulos & DeCoulos, Peabody, MA.

For CHRYSLER CORPORATION, Defendant: Robert D. Cultice, Richard M. Gilbert, Goldstein & Manello, P.C., Boston, MA.

ROBERT B. COLLINGS, United States Magistrate Judge

MEMORANDUM AND ORDER ON CHRYSLER'S MOTION TO DISMISS, OR, ALTERNATIVELY, STAY ACTION AND COMPEL ARBITRATION (# 7)

I. INTRODUCTION

Plaintiff's complaint, filed in Essex Superior Court and removed to this Court by the defendant, seeks recovery under Massachusetts General Laws, Chapter 93B which regulates business practices between motor vehicle manufacturers, distributors and dealers. Specifically, the plaintiff operates an automobile dealership in Salisbury, Massachusetts under the name of Seacoast Motors of Salisbury, Inc. ("Seacoast") which

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[1] The within case has been referred to the undersigned United States magistrate judge for all purposes, including trial and entry of judgment, pursuant to 28 U.S.C. § 636(c).

sells Chrysler, Plymouth, Jeep and Eagle vehicles. About a year ago, Chrysler gave notice to Seacoast that it was establishing a dealership in Haverhill, Massachusetts. Seacoast maintains that the establishment of that dealership will adversely affect its business and is an unfair method of competition and an unfair and deceptive act or practice prohibited by Chapter 93B.

Chrysler has filed a motion to dismiss, or, alternatively, to compel arbitration of the dispute. There is no question but that the parties voluntarily entered into an agreement to arbitrate all disputes and that the plain language of the agreement encompasses claims such as one brought pursuant to Chapter 93B. The issue in the case is whether or not, as a matter of law, claims under Chapter 93B can be subject to arbitration even when there is an agreement to arbitrate. Seacoast maintains that claims under Chapter 93B are similar to antitrust claims which, as a matter of public policy, have been found to be nonarbitrable. *See Hunt v. Mobil Oil Corp.*, 444 F. Supp. 68, 69 (1977).

II. STATE LAW

It is interesting to note that as originally enacted, Chapter 93B contained a provision which mandated that disputes arising under the section be arbitrated. The Supreme Judicial Court, in commenting on that statute, wrote that "the statute does not make arbitration contingent on the request or consent of the parties." *See Foreign Auto Import, Inc. v. Renault Northeast, Inc.*, 367 Mass. 464, 472, 326 N.E.2d 888, 893-4 (1975). However, the Court did note that there might be a question as to whether a claim under Chapter 93B could ever be subject to arbitration, writing:

> ...The plaintiff does not ask that the defendants be required to arbitrate the dispute as apparently required by statute. The defendants not only do not ask for arbitration, but argue that the statutory provision for compulsory and binding arbitration of a dispute on the relevant market

> area violates the Federal anti-trust laws in several respects. We intimate no opinion on the defendants' contention.

Foreign Auto Import, Inc., 367 Mass. at 472, 326 N.E.2d at 893.

In 1977, Chapter 93B was amended to eliminate the provision for mandatory arbitration; however, nothing was contained in the amendments which would either prohibit or allow arbitration of claims arising under that chapter. To the extent that a parallel can be drawn vis-a-vis arbitration as between Chapter 93B and Chapter 93A, which concerns the regulation of business practices for consumer protection, there is a statutory difference between claims brought under Chapter 93A, § 9 and § 11. Section 11 allows persons "...engaged in the conduct of any trade or commerce" who have suffered a loss to sue those who caused the loss by unfair methods of competition. These claims may be the subject of arbitration pursuant to an agreement between the parties. *Greenleaf Engineering & Construction Company, Inc. v. Teradyne, Inc.*, 15 Mass. App. Ct. 571, 574-6, 447 N.E.2d 9, 12-13 (1983); *Francis v. Marshall*, 661 F. Supp. 773, 775 (D. Mass., 1987).

However, claims under Chapter 93A, § 9 which permits persons other than those engaged in trade or commerce, i.e., consumers, to bring suit, are not subject to arbitration by reason of § 9(6) which provides that:

> Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section...

See Hannon v. Original Gunite Aquatech Pools, 385 Mass. 813, 826, 434 N.E.2d 611, 618-19 (1982) ("While arbitration pursuant to a contract does not fall neatly into the categories of remedies listed in G.L. c. 93A, § 9(6), we think it

comprehended within either 'common law' or statutory remedies.")[2]

It is my opinion that there is no statutory ban on enforcing an arbitration agreement between the parties as to claims brought under Chapter 93B. In repealing the mandatory arbitration provision of Chapter 93B in 1977, the Legislature offered no hint that it was doing more than ending mandatory arbitration and prohibiting voluntary arbitration of any dispute under Chapter 93B. That the Legislature chose to prohibit a plaintiff bringing a claim under § 9 of Chapter 93A from being forced to arbitrate the claim but permitted enforcement of an agreement to arbitrate claims brought under § 11 of Chapter 93A convinces me that if the Legislature wanted to prohibit claims under Chapter 93B from being arbitrated, it would have said so explicitly.

III. FEDERAL LAW

As noted, supra,[3] the Federal Arbitration Act requires arbitration agreements to be enforced. However, antitrust claims are an exception to the rule as a result of the so-called "American Safety doctrine" enunciated in the case of *American Safety Equipment Corporation v. J.P. Maguire & Co.*, 391 F.2d

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[2] The question of the requirements of the Federal Arbitration Act, 9 U.S.C. § 2, was not raised in the *Hannon* case. State laws which prohibit the enforcement of agreements to arbitrate violate the Supremacy Clause of the United States Constitution because of the Federal Arbitration Act unless the agreement falls within the "two limitations" to the Act. *Southland Corporation v. Keating*, 465 U.S. 1, 10-16, *(1984); Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 158 (1 Cir., 1983). Neither of the limitations is applicable to either the instant case or the Hannon case. The result is the same regardless of whether the claim which is the subject of an arbitration agreement has been brought in federal or state court. Id.; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24,*(1983)*. Whether a Chapter 93B claim falls within the principle that antitrust claims are not subject to arbitration is discussed, *infra*, at part III.

[3] *See* footnote 2, *supra*.

821 (2 Cir., 1968). In 1976, Judge Weinfeld summed up the law on this point: "It is now cardinal doctrine that the public interest in the enforcement of the antitrust laws makes antitrust claims inappropriate subjects for arbitration." *Hunt v. Mobil Oil Corporation,* 410 F. Supp. 10, 25 (S.D.N.Y., 1976) citing *American Safety Equipment Corporation,* 391 F.2d 821.

Plaintiff argues that a Chapter 93B claim is so similar to an antitrust claim that the same principle should be applied. The Supreme Judicial Court acknowledged the argument in the Foreign Auto Import case but "intimated no opinion" on the matter. *Foreign Auto Import, Inc.,* 367 Mass. at 472, 326 N.E.2d at 893. So far as appears, no Massachusetts court has had occasion since to express an opinion on the issue.

However, the First Circuit has affirmed a district court ruling ordering claims under the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1221 *et seq.*, and the Puerto Rico Dealers' Act, 10 L.P.R.A. § 278a, to arbitration. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.,* 723 F.2d 155, 162-3 (1 Cir., 1983), *rev'd on other grounds*, 473 U.S. 614 (1985). However, it does not appear that counsel in that case were arguing that those claims were not subject to arbitration as a matter of law but rather that they did not come within the terms of the specific arbitration agreement between the parties. What is noteworthy is that the case also involved claims under the Sherman Act and the Puerto Rico Antitrust Law arising out the same set of facts, and the First Circuit, applying the "American Safety doctrine", noted that those claims were not arbitrable under United States law. *Mitsubishi Motors Corporation,* 723 F.2d at 163-4.

However, the Supreme Court reversed that holding as to international as opposed to domestic antitrust disputes, *Mitsubishi Motors Corporation,* 473 U.S. at 628-640, and in so doing, cast considerable doubt on the rationale which formed

the basis of the proposition that antitrust cases are not subject to arbitration.[4] The Court wrote:

> At the outset, we confess to some skepticism of certain aspects of the American Safety doctrine. As distilled by the First Circuit, 723 F.2d at 162, the doctrine comprises four ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, *i.e.*, expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, ... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community -- particularly those from a foreign community that has had no experience with or exposure to our law and values." *See American Safety,* 392 F.2d 821 at 826 -827.

Mitsubishi Motors Corporation, 473 U.S. at 632.

The Supreme Court found the "second concern unjustified" because "[a] party resisting arbitration of course may attack directly the validity of the agreement to arbitrate."

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[4] The Court wrote that: "we find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic disputes." *Mitsubishi Motors Corp.,* 473 U.S. at 629.

Id. citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, (1967). As to the third factor, the Court further wrote that "...potential complexity should not suffice to ward off arbitration..." because:

> Adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation experts either employed by the parties or appointed by the tribunal.

Mitsubishi Motors Corporation, 473 U.S. at 633 (footnote omitted). With respect to the fourth factor, the Court:

> ...rejected the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes.

Id. at 634. The Court noted that:

> ...arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly. We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

Mitsubishi Motors Corporation, 473 U.S. at 634 (footnote omitted).

Lastly, as to the first factor, the Court noted that it was undoubtedly true that "...the private cause of action plays a central role in enforcing this regime [of antitrust laws]" and that "the treble-damages provision wielded by private litigants is a chief tool in the antitrust enforcement scheme...". *Id.* at

635. However, the Court wrote that "the importance of the private damages remedy...does not compel the conclusion that it may not be sought outside an American court." *Id.* The reason is that:

> Notwithstanding its important incidental policing function, the treble-damages cause of action...seeks primarily to enable an injured competitor to gain compensation for that injury...[and] is designed primarily as a remedy."

Id. at 635-6 quoting from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-6, (1977).

What is especially telling about this analysis is that although the holding is confined to international arbitration, *See* footnote 4, *supra*, the Court's reasoning would apply equally well to domestic antitrust cases. In these circumstances, I am unwilling to expand the "American Safety doctrine" to cases brought under Chapter 93B. Applying the four factors of the doctrine as interpreted by the Supreme Court, the party resisting arbitration of a Chapter 93B claim may challenge the validity of the agreement to arbitrate on the ground that it amounts to a contract of adhesion. Chapter 93B cases are not particularly complex. There is no basis for a finding of any "innate hostility to the constraints on business," *Mitsubishi Motors Corporation,* 473 U.S. at 634, that Chapter 93B sets forth. Lastly, although private actions brought under Chapter 93B, like the antitrust laws, perform an important function in curbing unfair and coercive practices in the automobile franchising industry and thereby promote competition in the industry, this function is "incidental" to the primary function which is to give an injured dealer the ability to obtain compensation for its injury. *Id.* at 635-6.

IV. CONCLUSION AND ORDER

For all of the above-stated reasons, I rule that the "American Safety doctrine," whatever its current validity, does

not have the effect of prohibiting the arbitration of claims brought under Chapter 93A. It is ORDERED that Chrysler's Motion to Dismiss, or, Alternatively, Stay Action and Compel Arbitration (# 7) be, and the same hereby is, ALLOWED. Judgment shall enter dismissing the Complaint.

ROBERT B. COLLINGS

United States Magistrate Judge

April 22, 1997.

SEACOAST MOTORS OF SALISBURY, INC., Plaintiff,
v. CHRYSLER CORPORATION, Defendant.
CIVIL ACTION NO. 96-11695-RCL
(COLLINGS, U.S.M.J.)[1]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

JUDGMENT

COLLINGS, U.S.M.J.

This case came on before the Court, the Honorable Robert B. Collings, United States Magistrate Judge, presiding, on Chrysler's Motion to Dismiss, or Alternatively, Stay Action and Compel Arbitration (#7). Upon the allowance of said motion in a Memorandum and Order entered this date,

IT IS ORDERED AND ADJUDGED:

Judgment dismissing the Complaint; costs to defendants.

TONY ANASTAS
CLERK OF COURT

By: /s/
Nancy Lee Irwin
Deputy Clerk

Dated at Boston, Massachusetts
This 22nd day of April, 1997

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[1] The within case has been referred to the undersigned United States magistrate judge for all purposes, including trial and entry of judgment, pursuant to 28 U.S.C. § 636(c).

STATUTES

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be

dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

TBP
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Supreme Court U.S.
FILED
OCT 26 1998
CLERK

No. 98-415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Seacoast Motors of Salisbury, Inc.,

Petitioner,

v.

Chrysler Corporation,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONER (TO BE PRINTED)

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3 pp

SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner submits this Supplemental Brief in light of a further development in a related matter: the October 7, 1998 argument in No. 97-889, *Wright v. Universal Maritime Service Corporation*.

In this case, No. 98-415, the district court dismissed Petitioner's complaint pending arbitration. Petitioner appealed. The First Circuit, however, dismissed the appeal on the ground that it lacks jurisdiction under either 9 USC 16 or 28 USC 1291. Petitioner then sought review in this Court, presenting the question whether a federal court of appeals has jurisdiction to hear an immediate appeal of the dismissal of a plaintiff's complaint pending arbitration.

Although the parties have not raised or briefed the issue, the same question also is presented in another case in which this Court already has granted certiorari, received the merits briefs, and heard oral argument. No. 97-889, *Wright v. Universal Maritime Service Corporation* presents the question whether the general arbitration clause in a collective bargaining agreement encompasses claims under the federal anti-discrimination laws. But the jurisdiction of the Fourth Circuit over the *Wright* Petitioner's appeal is open to question. Just as in this case, the district court in *Wright* dismissed the Petitioner's complaint pending arbitration. The Petitioner then appealed the dismissal to the Fourth Circuit.

In this Court, neither the *Wright* Petitioner nor Respondent briefed the Fourth Circuit's jurisdiction over the Petitioner's appeal. Nor (we are advised) did they or the Court raise the question at the October 7, 1998 oral argument. But because the issue nonetheless goes to the subject matter jurisdiction of the court of appeals (and therefore of this Court), it must be resolved before the Court may reach the merits in *Wright*. *See Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-79 (1977).

Because the briefing and argument in *Wright* already are concluded, our view is that the Court ought to grant certiorari in this case to resolve the jurisdictional issue. The question presented is difficult, close and frequently recurring, as demonstrated by the resulting five-to-three split in the circuits. *See generally* Reply Br., No. 98-189, *De Carbon v. GMC*. We recognize that the Court recently denied certiorari in related matters presenting this question. No. 97-1895, *McCarthy v. Providential Corp.*; No. 98-189, *DeCarbon v. GMC*; and No. 98-297, *Napleton v. GMC*. But when the Court considered those Petitions, it was not aware that the issue would have to be resolved in *Wright*. If the Court disagrees with our recommendation, and elects instead to resolve the question in *Wright*, we ask that the Petition in this case be held pending the disposition of *Wright*.

Respectfully submitted,

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